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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
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Services

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[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 0 8 2010

IN RE: [redacted]

APPLICATION: Application for Waiver of the Foreign Residence Requirement under Section 212(e) of the Immigration and Nationality Act; 8 U.S.C. § 1182(e).

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State (DOS), Waiver Review Division (WRD).

The record reflects that the applicant, a native and citizen of Peru, obtained J-1 nonimmigrant exchange status in June 2003 to participate in graduate medical education/training. He is thus subject to the two-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e). The applicant presently seeks a waiver of his two-year foreign residence requirement, based on the claim that his U.S. citizen spouse and two children, born in 2007 and 2008, would suffer exceptional hardship if they moved to Peru temporarily with the applicant and in the alternative, if they remained in the United States while the applicant fulfilled the two-year foreign residence requirement in Peru.

The director determined that the applicant failed to establish that a qualifying relative would experience exceptional hardship if the applicant fulfilled his two-year foreign residence requirement in Peru. *Director's Decision*, dated June 29, 2009. The application was denied accordingly.

In support of the appeal, counsel for the applicant submits a brief, dated July 24, 2009 and referenced supplemental exhibits. The entire record was reviewed and considered in rendering this decision.

Section 212(e) of the Act states in pertinent part that:

> No person admitted under section 101(a)(15)(J) or acquiring such status after admission
>
> > (i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence,
> >
> > (ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency, pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or
> >
> > (iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section 101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a least two years following departure from the United States: Provided, That upon the favorable recommendation of

> the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization [now, Citizenship and Immigration Services (CIS)] after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General [now the Secretary, Homeland Security (Secretary)] may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General (Secretary) to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(l): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General (Secretary) may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

In *Matter of Mansour,* 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "Therefore, it must first be determined whether or not such hardship would occur as the consequence of her accompanying him abroad, which would be the normal course of action to avoid separation. The mere election by the spouse to remain in the United States, absent such determination, is not a governing factor since any inconvenience or hardship which might thereby occur would be self-imposed. Further, even though it is established that the requisite hardship would occur abroad, it must also be shown that the spouse would suffer as the result of having to remain in the United States. Temporary separation, even though abnormal, is a problem many families face in life and, in and of itself, does not represent exceptional hardship as contemplated by section 212(e), supra."

In *Keh Tong Chen v. Attorney General of the United States,* 546 F. Supp. 1060, 1064 (D.D.C. 1982), the U.S. District Court, District of Columbia stated that:

> Courts deciding [section] 212(e) cases have consistently emphasized the Congressional determination that it is detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from his country would cause personal hardship. Courts have effectuated Congressional intent by declining to find exceptional hardship unless the

> degree of hardship expected was greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad." (Quotations and citations omitted).

The first step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or children would experience exceptional hardship if they resided in Peru for two years with the applicant. The applicant's spouse contends that she would suffer medical hardship, as she has been diagnosed with Moderate Persistent Asthma, and the condition worsens in times of stress and/or in areas of high pollution and humidity. She notes and documents that while living in Peru, she had multiple asthma exacerbations with a frequency of three to four times a year, and was required to visit the emergency room. *See Letter and Translation from* , dated July 14, 2008 and *Affidavit of* dated February 11, 2009. In addition, the record establishes that the applicant's spouse has recently accepted a position as a full time faculty member for the Division of Geriatrics at the University of Michigan. *Letter from* , dated July 18, 2008. She contends that were she to relocate to Peru, she would experience career disruption and hardship, as she would not be able to practice medicine upon arrival since the Peruvian Department of Health has a requirement that physicians complete a one year medical service in a rural area as a requirement prior to practicing medicine. As the applicant's spouse did not complete this requirement as of yet, returning to Peru would limit her career options and cause a setback in her professional career since she would not be able to practice her medical specialty upon her return. Finally, the applicant's spouse references the problematic country conditions in Peru, including violent crime and kidnappings.[1] She references that she was robbed multiples times while in Peru, one of her medical school friends was murdered for unknown reasons after starting her

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[1] At noted by the U.S. Department of State, in pertinent part:

> Violent crime, including carjacking, assault, sexual assault, and armed robbery is common in Lima and other large cities. The Embassy is aware of reports of women being sexually assaulted in their place of lodging. Women traveling alone should be especially careful to avoid situations in which they are vulnerable due to impaired judgment or isolation. Resistance to violent crime often provokes greater violence, while victims who do not resist usually do not suffer serious physical harm. "Express kidnappings," in which criminals kidnap victims and seek to obtain funds from their bank accounts via automatic teller machines, occur frequently. Thieves often smash car windows at traffic lights to grab jewelry, purses, backpacks, or other visible items from a car. This type of assault is very common on main roads leading to Lima's Jorge Chavez International Airport, specifically along De la Marina and Faucett Avenues and Via de Evitamiento, but it can occur anywhere in congested traffic, particularly in downtown Lima.... Passengers who hail taxis on the street have been assaulted.

Country Specific Information-Peru, U.S. Department of State, dated November 2, 2009.

medical practice and another medical school friend was injured for unknown reasons as he was transporting a patient. *Supra* at 4, 6-7, 9-10.

Documentation has been provided by counsel establishing the applicant's spouse's medical condition and its exacerbation due to stress and/or poor air quality, her career accomplishments, and country conditions in Peru, including economic instability, crime and violence, human rights abuses, health concerns and the problematic employment situation for physicians. Based on a totality of the circumstances, the AAO concurs with the director that the applicant's U.S. citizen spouse would suffer exceptional hardship were she to relocate to Peru due to medical hardship, significant career disruption, and exposure to the problematic country conditions in Peru. A relocation abroad would cause the applicant's spouse hardship that would be significantly beyond that normally suffered upon the temporary relocation of families due to a foreign residency requirement.

The second step required to obtain a waiver is to establish that the applicant's U.S. citizen spouse and/or children would suffer exceptional hardship if they remained in the United States during the period that the applicant resides in Peru. In a declaration the applicant's spouse states that she would suffer exceptional emotional hardship due to the long and close relationship she has with the applicant and due to the fact that she would be required to raise two young children without the applicant's daily presence and support. She further notes that her children would suffer exceptional emotional hardship due to their father's long-term absence, thereby causing her emotional hardship. In addition, the applicant's spouse states that she would suffer medical hardship, as she is asthmatic and stressful situations, including the loss of her husband's physical presence for a two-year period and the responsibilities of caring for her two young children, one who has been diagnosed with asthma with multiple emergency and office visits during the last year, while maintaining her career as a physician, would worsen her situation. She documents that stress has been a trigger for past asthma attacks that have lead to multiple medical evaluations and emergency room visits. Finally, she expresses her concern for her husband's safety and well-being while in Peru, in light of the problematic country conditions in Peru and the fact that the applicant also has been diagnosed with severe persistent asthma and his condition would worsen due to environmental factors in Peru. *Supra* at 2-6.

Based on the record, the AAO has determined that the applicant's U.S. citizen spouse would experience exceptional hardship if she remained in the United States while the applicant relocated to Peru to comply with his foreign residency requirement. The applicant's spouse would be required to assume the role of primary caregiver and breadwinner to two young children, one with medical issues that have required extensive evaluation and emergency room visits, while continuing to manage and maintain her career as a physician without the complete support of the applicant. In addition, the applicant's spouse would be required to properly manage the stress inherent in working as a physician and raising two children while her husband resides abroad, to ensure that her medical condition does not worsen. Finally, as the applicant's spouse asserts, separating two young children from their father, who has played a pivotal role in their day to day care, would cause hardship to the applicant's spouse. As such, were the applicant to relocate abroad to comply with his foreign residency requirement, the applicant's spouse would suffer exceptional hardship.

The AAO thus finds that the applicant has established that his U.S. citizen spouse would experience exceptional hardship were she to relocate to Peru and in the alternative, were she to remain in the United States without the applicant, for the requisite period. The evidence in the record establishes the hardship the applicant's spouse would suffer if the applicant temporarily departed the U.S. would go significantly beyond that normally suffered upon the temporary separation of families.[2]

The burden of proving eligibility for a waiver under section 212(e) of the Act rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that in the present case, the applicant has met his burden. The appeal will therefore be sustained. The AAO notes, however, that a waiver under section 212(e) of the Act may not be approved without the favorable recommendation of the DOS. Accordingly, this matter will be remanded to the director so that she may request a DOS recommendation under 22 C.F.R. § 514. If the DOS recommends that the application be approved, the secretary may waive the two-year foreign residence requirement if admission of the applicant to the United States is found to be in the public interest. However, if the DOS recommends that the application not be approved, the application will be re-denied with no appeal.

ORDER: The matter will be remanded to the Director to request a section 212(e) waiver recommendation from the Director, U.S. Department of State, Waiver Review Division.

[2] As the AAO has determined that exceptional hardship exists with respect to the applicant's U.S. citizen spouse were the applicant to relocate to Peru for a two-year period, it is not necessary to evaluate whether the applicant's U.S. citizen children would experience exceptional hardship were the applicant to relocate abroad for a two-year period.